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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, Infant, by Raymond Gonzales and Margaret R. Gonzales, his parents

and

RAYMOND GONZALES and
MARGARET R. GONZALES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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and

RAYMOND GONZALES and MARGARET R. GONZALES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in its cases No. 73-2351 and No. 73-2352, which were consolidated with its cases No. 73-2348, No. 73-2349, and No. 73-2350.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, and order amending the opinion, which appear at Appendix A, *infra*, is not yet officially reported. The memorandum opinion and order of the district court (App. B, *infra*) is reported at 363 F. Supp. 1200.

JURISDICTION

The judgment of the Court of Appeals in the consolidated cases (App. C, *infra*) was entered on April 15, 1975. Petitions for rehearing were timely filed by the respondents in cases No. 73-2351 and 73-2352, and by intervenor Southern Independent School Association in cases No. 73-2348, 73-2349, and 73-2350. The petitions for rehearing were denied by the Court of Appeals in its order entered May 29, 1975 (App. A, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. Sec. 1981 prohibits a small private school for children from pre-primary levels through the sixth grade, which is not open to all white children in the geographic area but instead restricts admission to those who meet its established academic and other criteria, from excluding an otherwise qualified Negro applicant solely on account of his race.

2. If so, whether such prohibition is void because

   (a) it is not within the scope of the 13th amendment; or

(b) the statute is unconstitutionally vague; or

(c) the statute ought to be construed so that it will not violate constitutional freedoms of association and privacy.

3. Whether the district court abused its discretion in issuing a permanent injunction to the respondents who at the time of trial no longer lived in the area, the child being a student in a public school in another county, had never sought injunctive relief requiring admission of the child to the school, and had been denied class action status by the district court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the First, Fifth, Ninth and Thirteenth Amendments to the Constitution of the United States. The statute involved is 42 U.S.C. Sec. 1981.

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Act of April 9, 1866, 14 Stat. 27, as codified in 42 U.S.C. Sec. 1981, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

The United States Court of Appeals for the Fourth Circuit has, pursuant to 28 U.S.C. Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioner is a small private school for children with a Pre-primary department composed of Nursery through Senior Kindergarten and an Elementary department consisting of grades one through six. It receives no assistance, financial or otherwise, from any state, local or federal agency. The average number of pupils in the school in the year here involved (1969) was 177; in 1968 the number was 208; in 1970 the number was 207. Its educational objectives and practices are geared to high standards of excellence, and it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity. It also operates a Summer Day Camp for children. The average number of children in the day camp in 1969 was 174; in 1968 the number was 145; in 1970 the number was 138. In the operation of its summer day camp the school also practices selectivity on the basis of age, school grade eligibility, maturity and other criteria. It is the school's policy to reject white applicants who do not meet its high standards for acceptance. It is not open to every white child in the area. Respondents are a Negro and his Negro parents, who applied for the child's admission to the summer day camp with the expectation of his being admitted to the first grade in the Fall. The child was then five and one-half years of age. These were the first Negroes to make application at the school since it commenced operations in 1955. On May 16, 1969, the application was rejected.

On December 19, 1972, respondents filed suit against the petitioner, on their own behalf and on behalf of other Negroes similarly situated, in the United States District Court for the Eastern District of Virginia, Alexandria Division, claiming that the rejection was for reasons of race and violated their rights under 42 U.S.C. Sec. 1981 and 42 U.S.C. Sec. 2000a (the claim under Sec. 2000a was withdrawn prior to trial) and seeking declaratory and injunctive relief as well as monetary damages and attorneys fees. The jurisdiction of the court was invoked under 28 U.S.C. Secs. 1337, 1343 (4), 2201 and 2202. On the same day, respondents and two other Negro parents and their child filed a virtually identical suit in the same court against the owners of another small private school (Bobbe's School), seeking the same relief on the same grounds and under the same statutes. The Southern Independent School Association intervened in the Bobbe's School case. The cases were consolidated for trial. The adult respondents testified at trial that after the rejection by petitioner, and rejection about a week later by Bobbe's School, the child was accepted immediately at another private school in the area, which he attended for the next two years; and that a month before trial the respondents had moved out of the area to another county where the child at time of trial was attending a public school.

After hearing the evidence and considering a memorandum of law submitted by petitioner, the district court found that the petitioner had rejected the application because the child was black, and that this was petitioner's policy. It ruled that under *Jones v. Mayer*, 392 U.S. 409 (1968) and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), Section 1981, like Section 1982 must be read literally, and that read literally it applied to the rejection of respondents' application. The district court concluded that "the purpose of both [Sections 1981 and 1982] is to prohibit

all racial discrimination against non-whites," but not to prohibit racial discrimination by non-whites against whites. The district court also concluded that inasmuch as the "end result" of petitioner's admissions policy was to exclude the infant because he was black, notwithstanding its strictly established criteria for the admission of non-blacks, petitioner had no "plan or purpose of exclusiveness" for selection of students "other than race," quoting *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969); and that because the "opportunity" to attend the school was open to "every white child," under *Tillman* petitioner could not be considered "truly private." The court also stated that "*Sullivan v. Little Hunting Park* has abolished traditional notions of what is 'private' insofar as these types of actions are concerned."

The district court (1) gave respondents a declaratory judgment that petitioner's policy with respect to the admission of students to its day camp and school discriminated on the basis of race or color in violation of Sec. 1981; (2) granted respondents a permanent injunction against petitioner, its agents and those acting in concert with it, prohibiting them from following such discriminatory admissions policy; (3) awarded compensatory damages in favor of the infant respondent, in the amount of $2,000; (4) awarded respondents attorney's fees in the amount of $1,000; and (5) denied class action status to respondents.

Petitioner appealed, respondents filed a cross-appeal, and Bobbe's School and the intervenor Southern Independent School Association appealed the decision in their case. The appeals were consolidated in the Court of Appeals, and were heard by seven judges sitting *en banc*. A majority of four of the judges affirmed the decision of the district court with respect to all issues except the issue as to the award of attorney's fees, with three judges dissenting. A majority of

four reversed the district court with respect to the award of attorney's fees, with three judges who had been in the majority on the other issues, dissenting.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision dealt with important questions of federal law which have never been considered and decided by this Court, and misconstrued and misapplied two of this Court's recent decisions. The three dissenting judges in their opinion stated that the principal legal issue in this case "is presented to this court as one of first instance in any federal court at this or higher level. We are bound by no definitive Supreme Court decision." (App. A, at p. 21a, *infra*).

In *Jones v. Mayer, supra,* this Court held that Sec. 1982 prohibits refusal by a real estate developer to sell a home in his development to Negroes because of their race, if it is on the market and he is willing to sell it on the same terms to white purchasers. Although there was a strong dissent by Mr. Justice Harlan, concurred in by Mr. Justice White, and there has been some criticism of the decision in the legal literature, especially with respect to its interpretation of the language and legislative history of the statute,[1] it has been followed by the Court in each of the two cases (*Sullivan* and *Tillman*) involving the Civil Rights Act of 1866 that have come before the Court subsequent to *Jones*. In each of the later decisions the Court applied Sec. 1981 or Sec.

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[1] See, *e.g.*, *Casper*, Jones v. Mayer: Clio, Bemused and Confused Muse, 1968 Sup. Ct. Rev. 89-132; *The Supreme Court*, 1967 Term, 82 Harv. L. Rev. 63, 93-103 (1968); *Ervin*, Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot, 22 Vand. L. Rev. 485, 495-97 (1969).

1982 to a situation that involved the sale, lease or use of real property or rights connected with real property. And it is significant that in both decisions the Court gave sanction to the limiting principle that private associations (or their facilities) which have a "plan or purpose of exclusiveness," and which are not "open to every white person within the geographic area, there being no selective element other than race", are not subject to the prohibitions of the statute. (*Sullivan*, at 396 U.S. 236, *Tillman* at 410 U.S. 438). Petitioner, with its high standards of excellence and selectivity in the admission of students on the basis of sound educational standards and criteria, clearly falls within that principle, and not within the prohibitions of Sec. 1981.

It should also be noted that in two other decisions subsequent to *Jones, Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Gilmore v. The City of Montgomery*, 417 U.S. 556 (1974), the former involving a racially segregated private club and the latter racially segregated private schools, this Court held that in the absence of state action the Equal Protection Clause of the Fourteenth Amendment did not require the private club to admit a Negro guest, or require denial of the shared use of public facilities by the private schools.

In his dissent in *Jones* Mr. Justice Harlan questioned the Court's interpretation of the language and legislative history of Sec. 1982 making it applicable to purely private action. It was his opinion that the word "right" as used in the statute referred to a right to equal status under the law, and not to an absolute right enforceable against individuals. He also differed with the Court in its finding that the language of the statute was plain and unambiguous, and said at 392 U.S. 452:

> "The Court finds it 'plain and unambiguous,' *ante*, at 420, 20 L.Ed.2d at 1197, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the term 'right,' as used in Sec. 1982. The 'right' referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an 'absolute' right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter."

At 392 U.S. 476, he referred to Sec. 1982 as "a loosely worded statute." After a review of the original wording of the Civil Rights Act of 1866, and of its legislative history, Mr. Justice Harlan concluded that Section I of the Act (which included what is now 42 U.S.C. Secs. 1981 and 1982) was intended to apply only to action taken pursuant to state or community authority.

Mr. Justice Harlan also dissented in *Sullivan*, and was joined in his dissenting opinion by the Chief Justice and Mr. Justice White. In the course of his opinion, at 396 U.S. 241, he described Sec. 1982 as "both vague and open-ended . . .", and at 396 U.S. 248, as "a very vague statute", and warned:

> "And lurking in the background are grave constitutional issues should Sec. 1982 be extended too far into some types of private discrimination."

Mr. Justice Harlan's warning was a prophetic one. For in petitioner's case the Court of Appeals has gone too far. Unaccountably, it went beyond the rulings of this Court in

Sullivan and *Tillman* and ignored the limiting principle clearly expressed in both of those decisions. Petitioner's school and summer day camp fully met the tests defined in *Sullivan* and *Tillman*, but the Court of Appeals misread those decisions, holding that Sec. 1981 prohibits acts of racial discrimination by a small private school for children irrespective of the fact that it is not open to every white person (child) in the area (or for which it has room), and irrespective of the fact that it does indeed have a plan or purpose of exclusiveness and does indeed impose strict selective requirements for admission other than race.

It has been noted that *Jones*, *Sullivan* and *Tillman* all involved situations relating to the purchase, lease, or use of real property, and rights incident to real property. The dissenting judges of the Court of Appeals argued that there is an essential difference between the right to purchase real estate, a purely commercial transaction, under Sec. 1982, and the claimed right to attend a small private school for children, under Sec. 1981. They pointed out that many other contracts are likewise purely commercial, but that the relationship of a teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. "The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of Sec. 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (App. A, p. 22a, *infra*).

The dissenting opinion also noted that it was not until after the passage of the Civil Rights Act of 1964 that the Civil Rights Act of 1866, after lying dormant for 100 years,

was reactivated, and that whatever the intent of the 1866 Congress may have been, the 1964 Congress did not intend to restrict the admissions policies of independent schools. In this connection it is important to note that the legislative history of the 1866 Act does in fact provide persuasive evidence that it was *not* the intent of the 1866 Congress to apply Sec. 1981 to schools.

When the Civil Rights Bill of 1866 reached the House, the floor leader, Mr. Wilson of Iowa, Chairman of the Judiciary Committee, to which the bill had been committed, opened the debate, reading and explaining the bill in its entirety. In explaining that part of the bill containing the language which is now Secs. 1981 and 1982, he said:

> "This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities.' What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. *Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. . . .*" (Emphasis supplied) Congressional Globe, 39th

> Cong., 1st Session (1866), H. p. 1117; Avins, The Reconstruction Amendments' Debates, Richmond, Va., 1967, page 163.

In *Jones* the Court gave particular weight to the statements of Congressman Wilson, quoting him twice, once at the close of the opinion, and he was quoted in the dissenting opinion twice and mentioned an additional time.

At a later point in the debate, Congressman Wilson explained that the "great fundamental civil rights" sought to be protected by the bill were, as defined by Blackstone, the right of personal security, the right of personal liberty, and the right of personal property; and as defined by Chancellor Kent (Kent's Commentaries):

> "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable." Congressional Globe, 39th Cong., 1st Session (1866), H. p. 1118; Avins, *supra*, page 164.

The holding of the Court of Appeals in the instant case resulted from a failure to recognize the limiting principle established in *Sullivan* and *Tillman*, which was foreshadowed in *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969), and reinforced in *Moose Lodge* and *Gilmore*, and from a failure to perceive the essential differences between Secs. 1981 and 1982 in language, scope, and Congressional intent, and between a purely commercial transaction on the one hand, and the education of children in a private school on the other.

The Thirteenth Amendment abolished slavery and involuntary servitude and granted Congress power to enforce the abolition by appropriate legislation. By the process of judicial interpretation the term "slavery" as used in the Thirteenth Amendment now includes what are called "the badges and incidents of slavery." This Court said in *Jones* at 392 U.S. 439, that the authority of Congress to enforce the Thirteenth Amendment by appropriate legislation included the power to eliminate all racial barriers to the acquisition of real and personal property, because such barriers are badges and incidents of slavery, and that therefore the refusal of the real estate developer, under the circumstances of that case, to sell a residence to Negroes, was a violation of Sec. 1982.

It has already been noted that in his dissenting opinion in *Jones,* concurred in by Mr. Justice White, Mr. Justice Harlan said that he did not find Sec. 1982 "plain and unambiguous;" that for him "there is an inherent ambiguity in the term 'right' as used in Sec. 1982 . . .", and that he also described Sec. 1982 as "a loosely worded statute." In his dissenting opinion in *Sullivan,* which was concurred in by the Chief Justice and Mr. Justice White, he described Sec. 1982 as "both vague and open-ended", and as "a vague statute." There is the same inherent ambiguity in the use of the term "right" in Sec. 1981 as Mr. Justice Harlan found with respect to its use in Sec. 1982. But Sec. 1981 far exceeds Sec. 1982 in vagueness and open-endedness, and in loose wording. Sec. 1982 is at least limited in its scope to transactions with respect to property. Sec. 1981, if read as the district court read it – literally – applies to every contact or communication between white and colored persons in a context that could lead to the making of a contract. If read as the Court of Appeals read it, it applies to every contact or communication between white and colored

persons in a context that could lead to the making of a contract, except "certain intimate and private affairs of men and women," as, for example, "the relations of husband and wife." (App. A, p. 12a, *infra*). In the area of private education, the Court of Appeals conceded another exception, in these words:

> "Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race." (App. A, p. 13a, *infra*).

It is improbable that there are many such affluent siblings among the parents who prefer to educate their children in private schools like petitioner's.

The unlimited breadth of the language of Sec. 1981 makes it doubtful that Congress intended by that part of the Civil Rights Act of 1866 to give to non-whites the abolute right or power to force unwilling whites to enter into "contracts" with them. It may be assumed that many if not most of the members of the Congress were lawyers. Senator Trumbull of Illinois, who introduced the Civil Rights Bill and its companion measure, the Freedmen's Bureau Bill, in the Senate, was chairman of the Senate Judiciary Committee and a former state Supreme Court justice. (Avins, *supra*, page vi.). If they used the term "contract" in its ordinary sense, and as lawyers would use it, then they meant an agreement entered into by mutual assent, in which the parties exercised their free will, and were not coerced, intimidated or subjected to duress of any kind. With respect to Sec. 1981 at least, it is more likely that Congress was giving to the former slaves the legal status to make and enforce contracts, of which they may have been deprived during slavery or under the Black

Codes enacted in some of the states after adoption of the Thirteenth Amendment. Such deprivation of the legal status to make and enforce contracts clearly was one of the "badges and incidents" of slavery.

If, on the other hand, Sec. 1981 is construed as the Court construed Sec. 1982 in *Jones*, as giving non-whites an absolute right rather than a right of legal status, then it is clear that exclusion of a Negro child from a small private school for children, because of his race, cannot reasonably be considered one of the "badges and incidents" of slavery that the Thirteenth Amendment abolished, and as to which the Congress was authorized to enact "appropriate legislation," nor can it reasonably be concluded that Congress intended that a private act of discrimination of this kind would be within the scope of that part of the Act of 1866 that is now Sec. 1981.

II. The courts below have construed and applied Sec. 1981 so as to abridge the constitutional rights of freedom of speech, association and privacy of the petitioner and its patrons, which give to petitioner the right to maintain and operate a private school which is limited to or which excludes any racial, religious or other group it chooses, and to parents the right to educate their children in the school of their choice – whether public or private or parochial – including a private school which excludes Negroes. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Norwood v. Harrison*, 413 U.S. 455 (1973); *Gilmore v. City of Montgomery*, *supra*.

As this Court stated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972):

"The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed:

'Under the doctrine of Meyer v. Nebraska, 262 U.S. 390 (67 L.Ed.2d 1042, 43 S. Ct. 625, 29 ALR 1446), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S. at 534-535, 69 L.Ed.2d at 1078."

These rights of the petitioner and the parents who are its patrons have their source in the Bill of Rights, and specifically in the First, Fifth and Ninth Amendments. In addition to the cases cited *supra*, see *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *NAACP v. Button*, 371 U.S. 415, 430-431 (1963);

the concurring opinion of Mr. Justice Goldberg, in which the Chief Justice and Mr. Justice Brennan joined, in *Griswold v. Connecticut, supra,* at 381 U.S. 488; *Roe v. Wade,* 410 U.S. 113 (1973); and *Healy v. James,* 408 U.S. 312 (1972).

In *United States v. Vuitch,* 402 U.S. 62 (1971) at p. 70, this Court said:

> ". . . statutes should be construed whenever possible so as to uphold their constitutionality."

And in *Arnett v. Kennedy,* 416 U.S. 134 (1974) at 162, the Court said:

> "We have observed previously that the Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. United States v. 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7, 37 L.Ed. 2d 500, 93 X Ct. 2665; United States v. Thirty-seven Photographs, 402 U.S. 363, 368-369, 28 L.Ed.2d 822, 91 S. Ct. 1400."

See also, *Graham v. Richardson,* 403 U.S. 365, 382 (1971). It may well be, however, that the vagueness, ambiguity, open-endedness, and loose wording of Sec. 1981 will not permit of a constitutional construction, and that it must be struck down as unconstitutionally vague, because of its heavy impact on constitutionally protected freedoms. *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966); *Whitehall v. Elkins,* 389 U.S. 54 (1967); *Zwickler v. Koota,* 389 U.S. 241 (1967), on remand 290 F. Supp. 244, rev'd on other grounds, *Golden v. Zwickler,* 394 U.S. 103 (1969); *Boutilier v. Immigration Service,* 387 U.S. 118, 123 (1967); *Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); and *NAACP v. Button, supra,* at 432.

III. Respondents having been denied class action status, had to prove their right to individual injunctive relief at trial in order to be entitled to a permanent injunction. This principle has been firmly established in this Court. *O'Shea v. Littleton*, 414 U.S. 488 (1974). See also, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indianapolis School Commissioners v. Jacobs*, 43 L.Ed.2d 74, 95 S. Ct. 848 (1975); and *Moose Lodge, supra*. And see, *Lidie v. State of California*, 478 F.2d 552 (9th Cir. 1973); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971); *Ridley v. Hopper*, 485 F.2d 1377 (5th Cir. 1973); *Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974). Yet the uncontradicted testimony of respondents was that the infant respondent was admitted to another private school's summer day camp shortly after his rejection by petitioner; that he attended that private school for two years; that he attended a parochial school for two years; that a month before trial respondents moved out of the area, into another county, and that the infant respondent was at time of trial attending a public school there. Clearly, there was no continuing or threatened injury to the respondents in the maintaining by petitioner of what the district court had ruled was a racially discriminatory admissions policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1975.

APPENDIX A

[Filed April 15, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Defendants,
Southern Independent School Association,
Appellant.

No. 73-2349

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Appellants,
Southern Independent School Association,
Defendant.

No. 73-2350

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary,
Plaintiffs,

Colin M. Gonzales, infant by Raymond
Gonzales and Margaret R. Gonzales,
Appellants,

v.

Russell L. Runyon, Katheryn E. Runyon,

Southern Independent School Association,
Appellees.

No. 73-2351

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

No. 73-2352

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellants,

v.

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974. Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V.O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. § 1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

(continued)

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales' visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied

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[1] (continued) and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales' telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two-year-old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales' or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va., 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales' were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developed had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman - Reconstruction and Reunion, 1207, *et seq.* That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed

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[3] 14 Stat. 27.

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ***freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right

is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park, supra.* Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood v. Harrison,* 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum.. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not

direct recipients of public funds. Their actual and potential consistency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases in which damages for such injuries are denied.[5] That damages are recoverable for violations of § § 1981 and 1982 is established by *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, 240, in which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma

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[5] After the recent decision of the Virginia Supreme Court in *Womack v. Eldridge,* 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214 (1973).

which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy,"[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties

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[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1205 n. 5.

recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient.

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[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI, of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights stautes. We have recognized that a plaintiff under Title VII might recover attorney fees.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment. discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F.2d 143, (§§ 1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified*

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[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968, the Act applied to all dwellings, 42 U.S.C. § 3603(a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603(a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

on other grounds sub nom., Harper v. Kloster, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper v. Allen,* 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

exceptions applicable.[13]

AFFIRMED IN PART.
REVERSED IN PART.

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, had allowed attorney's fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award

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[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when dependants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"[14] of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have ot restricted the

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[14] *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorneys' fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States v. Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982, and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending prequisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

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[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C., 1971), the United States District Court for the Western District of North Caroline held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C. D., Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also, *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the Federal Government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post-Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, *et seq.* Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post-Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second-class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L. Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982, were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

made no attempt to prevent racial discrmination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: *i.e.*, (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).[4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

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[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalist*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we

(continued)

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational instutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social inteest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting[5] opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), stated, at p. 179, the proposition thus:

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4 (continued)

contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F. Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School at 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to

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[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, *et seq.*, citing Roecoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L. Rev. 471 at 478, 479 (1973), and 74 Col. L. Rev. 449, 468, 469 (1974).

be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools,* 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of Section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in Section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination,* 74 Col. R. Rev. 449, at 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian

terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, *supra*, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972, 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first-class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these ap-

pellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necesary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a

religious school in *Pearce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

We would reverse the judgment of the district court on all points.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

[Filed May 29, 1975, by William K. Slate, II, Clerk]

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,	:
Appellees,	:
v.	:

Russell L. Runyon, Katheryne E. Runyon,
Defendants,

Southern Independent School Association,
Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the

first sentence of Virginia Code § 8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five-year statute, the second sentence of § 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford*, 4th Cir. 462 F.2d 615; see *Almond v. Kent*, 4th Cir., 459 F.2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code § 8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorneys' fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allownace of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra*, 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

APPENDIX B

[Filed July 27, 1973]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al.*,	:	
Plaintiffs,	:	**Civil Action No.**
v.	:	**494-72-A**
FAIRFAX-BREWSTER SCHOOL, INC.	:	
Defendant,	:	
and	:	
MICHAEL C. McCRARY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No.**
RUSSELL L. RUNYON, *et al.*,	:	**495-72-A**
Defendants,	:	

and :

SOUTHERN INDEPENDENT SCHOOL: ASSOCIATION, :

Intervenor-Defendant. :

MEMORANDUM OPINION AND ORDER

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958, Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956, Fairfax-Brewster commenced operation of a summer day camp and in 1967, Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70, when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a

medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2-year-old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the

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[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were conslidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly, the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. §

1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra*, at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* [Emphasis added.] *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the Opportunity to attend these schools was open to every white child. *Tillman*, at 4313 and 4314. It is difficult to accept the defendants 'argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison,* 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.*, was cited to the contrary as an

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[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly, the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a, *et seq.*, it seems appropriate to point out that in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, Sullivan v. Little Hunting Park has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

---

[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2351

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Fairfax-Brewster School, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was aruged by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

Filed April 15, 1975

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 13

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

STATUTES INVOLVED

42 U.S.C. Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-66

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, Infant, by Raymond Gonzales and Margaret M. Gonzales, his parents

and

RAYMOND GONZALES and MARGARET R. GONZALES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 So. Cal. L. Rev. 274 (1967) 49

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Casper, *Jones v. Mayer, Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 99-126 49

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Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 Van. L. Rev. 485 (1969) 49

Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum. L. Rev. 449 (1974) . 49

Henkin, Foreword: *On Drawing Lines, The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63 (1968) 49

Hosmer, *The Outcome of the Civil War*, (Vol. 21, Hart, *The American Nation: A History*, 1905 ed.) 27

Comment, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc.*, 122 U. Pa. L. Rev. 471 (1973) 49

Nicolay and Hay, *Complete Works of Abraham Lincoln*, 1894, Vols. 2, 3 and 4 27

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The Writings of Thomas Jefferson, Memorial Edition, 1904, Vol. XV 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-66

FAIRFAX-BREWSTER SCHOOL, INC.,

Petitioner,

v.

COLIN M. GONZALES, Infant, by Raymond Gonzales and Margaret R. Gonzales, his parents

and

RAYMOND GONZALES and MARGARET R. GONZALES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc* (A. 4), and its order amending the opinion (A. 40) are reported at 515 F.2d 1082. The memorandum opinion and order of the United States District Court for the Eastern

District of Virginia, Alexandria Div., (Bryan, J.) (A. 133), is reported at 363 F. Supp. 1200.

JURISDICTION

The judgments of the Court of Appeals in consolidated cases Nos. 73-2348, 73-2349, 73-2350, 73-2351, and 73-2352, were entered on April 15, 1975. (A. 35-39) Petitions for rehearing were denied by order of the Court of Appeals entered on May 29, 1975. (A. 40). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the First, Fifth, Ninth and Thirteenth Amendments, which are set forth below:

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 13

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

The statute involved is set forth below:

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

QUESTIONS PRESENTED

1. Whether the Thirteenth Amendment empowered Congress to enact a statute prohibiting racial discrimination by a small private school for children, and if so, whether

42 U.S.C. § 1981 was intended to and does reach private discrimination by a private school for children.

2. Whether the "badges and incidents" interpretation of the Thirteenth Amendment, and the scope of the Civil Rights Act of 1866, may be extended to reach racial discrimination by a small private school for children.

3. Whether the construction and application of 42 U.S.C. § 1981 by the Court of Appeals violates constitutionally protected rights of personal liberty, privacy, and freedom of association, and if so, whether there is reasonable construction of the statute which would not violate such rights.

4. Whether an injunction should have been awarded to the respondents.

STATEMENT

Petitioner is a small private school for children located in Fairfax County, Virginia. (A. 59) It operates a summer day camp. (A. 59) It receives no assistance, financial or otherwise, from any state, local or federal agency, and to support its operations relies entirely on funds derived from tuition and fees paid by parents. (A. 134) Its treasurer, Steuart A. Reiss (now deceased), was a graduate of the United States School of Military Aeronautics. (A. 250, 253) Its president and Administrative Director, Robert S. Reiss, is the son of Steuart A. Reiss and has a degree in education from George Washington University. (A. 238, 253) Its Registrar, Olga M. Reiss, is the wife of Robert S. Reiss and also has a degree in education from George Washington University. (A. 237, 238, 252, 253) The School consists of a Pre-primary Department composed of Nursery through Senior Kindergarten, and an Elementary

School Department, consisting of Grades 1 through 6. (A. 238) Its educational objectives and practices are geared to high standards of excellence, and it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity. (A. 75-86, 90-91)

The basics of the school are educational qualifications and excellence. Its standards for kindergarten and first grade, for example, are much higher than those of the public schools and higher than many other private schools. (A. 251) Its Courses of Study for Senior Kindergarten (Defendant's Exh. 6, A. 90) show this. Its tuition rates are competitive or may be a little higher than those of other private schools. (A. 252) To qualify for admission to the First Grade, the application must show previous training, report card, evaluation, record of reading readiness and numbers testing. (A. 251) A child is admitted to the School only if he is of average or above intelligence and has an achievement potential in keeping with the class he seeks to enter, and he must be emotionally, socially, and physically acceptable. An applicant will not be admitted unless the Admittance Committee is satisfied that his presence in the School will be in the best interests of himself, his classmates, and the school in general. (A. 86) Parents send their children to the School because they realize it is a quality school and they are looking for a quality education for their children. (A. 255) A pupil is not promoted if he has not satisfactorily completed the required curriculum for his grade. (A. 80) The School's high standards rule out acceptance of a child in the first grade who has not had prior kindergarten training including reading and numbers. A day nursery is not the same as a kindergarten, and a child with only day nursery training would not

be accepted in the First Grade at Fairfax-Brewster School. No child with only day nursery training has ever been accepted in the First Grade at Fairfax-Brewster School. (A. 241-244) The enrollment contract provides that the School reserves the right to accept or deny the application of any child for any reason whatever. (A. 66).

No Negroes had ever applied prior to the application of respondents. (A. 244) White applicants are and have been denied admission if not qualified.

> "It would be our matter of policy. If we did not feel the white child could measure up to our standards, we would not accept him. Also, we might not accept him if we learned that he had an emotional problem or was abnormal in some way, or for physical reasons." (A. 244-245)

Many non-caucasians have been accepted at the school. (A. 88-89) Students are not limited to or selected from any particular geogrpahical area, although all live in Northern Virginia. (A. 254) The School does not advertise in newspapers, magazines, radio or television, but is listed in the telephone book. (A. 239) Most of the parents who send their children to the school learn about it from other parents. (A. 238) The enrollment application requires the applicant's religion to be stated. (A. 64) At snack-time, grace is said in the School. (A. 82)

Respondents are a Negro child and his Negro parents, who applied for the child's admission to the summer day camp with the expectation of his being admitted to the first grade in the Fall. (A. 179) The child was then five and one-half years of age. (A. 176) On May 16, 1969, the application was rejected. (A. 73)

On December 19, 1972, respondents filed suit against the petitioner, on their own behalf and on behalf of other Negroes similarly situated, in the United States District Court for the Eastern District of Virginia, Alexandria Division, claiming that the rejection was for reasons of race and violated their rights under 42 U.S.C. § 1981 and 42 U.S.C. § 2000a (the claim under § 2000a was withdrawn prior to trial) and seeking declaratory and injunctive relief as well as monetary damages and attorneys' fees. The jurisdiction of the court was invoked under 28 U.S.C. §§ 1337, 1343(4), 2201 and 2202. (A. 47) On the same day, respondents and two other Negro parents and their child filed a virtually identical suit in the same court against the owners of another small private school (Bobbe's School), seeking the same relief on the same grounds and under the same statutes. (A. 92-A) The Southern Independent School Association applied and was permitted to intervene in the Bobbe's School case. (A. 121, 129) Fairfax-Brewster School answered (A. 43), moved to dismiss (A. 55), and amended its answer adding additional defenses (A. 56) The cases were consolidated for trial. The claims of the adult plaintiffs for monetary damages were dismissed by the Court because barred by the applicable statute of limitations. (A. 58) The adult respondents testified at trial that after the rejection by petitioner, and rejection about a week later by Bobbe's School, the child was accepted immediately at another private school in the area, which he attended for the next two years; and that a month before trial the respondents had moved out of the area to another county where the child at time of trial was attending a public school. (A. 182-184) None of the School's evidence as to its high standards, its exclusiveness, its policy of rejecting unqualified white applicants, and as to the fact that it did not limit its pupils to those living within a particu-

lar geographical area, was contradicted or disputed at the trial. Mrs. Gonzales testified that at all times there was a public school available for the Gonzales child to attend. (A. 206) She also testified that in May or June, 1968, about a year before the rejection of the Gonzales application by the School, she had telephoned the School and requested and had been mailed material concerning the School's admission requirements. (A. 196)

After hearing the evidence and considering a memorandum of law submitted by petitioner, the district court found that the petitioner had rejected the application because the child was black (A. 135), and that this was petitioner's policy. It ruled that under *Jones v. Mayer*, 392 U.S. 409 (1968) and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), § 1981, like § 1982, must be read literally, and that read literally it applied to the rejection of respondent's application. (A. 138) The district court concluded that "the purpose of both [§§ 1981 and 1982]is to prohibit all racial discrimination against non-whites," (A. 139) but not to prohibit racial discrimination by non-whites against whites. (Footnote, A. 139) The district court also concluded that inasmuch as the "end result" of petitioner's admissions policy was to exclude the infant because he was black, notwithstanding its strictly established criteria for the admission of non-blacks, petitioner had no "plan or purpose of exclusiveness" for selection of students "other than race," quoting *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969) (A. 139); and that because the "opportunity" to attend the school was open to "every white child," under *Tillman* petitioner could not be considered "truly private." (A. 139) The court also stated that "*Sullivan v. Little Hunting Park* has abolished traditional notions of what is 'private' insofar as these types of actions are concerned." (A. 141)

The district court (1) gave respondents a declaratory judgment that petitioner's policy with respect to the admission of students to its day camp and school discriminated on the basis of race or color in violation of § 1981; (2) granted respondents a permanent injunction against petitioner, its agents and those acting in concert with it, prohibiting them from following such discriminatory admissions policy; (3) awarded compensatory damages in favor of the infant respondent, in the amount of $2,000; (4) awarded respondents attorneys' fees in the amount of $1,000; and (5) denied class action status to respondents. (A. 141-142)

Petitioner appealed, respondents filed a cross-appeal, and Bobbe's School and the Intervenor Southern Independent School Association appealed the decision in their case. The appeals were consolidated in the Court of Appeals, and were heard by seven judges sitting *en banc*. A majority of four of the judges affirmed the decision of the district court with respect to all issues except the issue as to the award of attorneys' fees, with three judges dissenting. A majority of four reversed the district court with respect to the award of attorneys' fees, with three judges who had been in the majority on the other issues, dissenting. The Court of Appeals has stayed the issuance of its mandate. (A. 43)

SUMMARY OF ARGUMENT

Congress was not empowered by the Thirteenth Amendment to enact a statute prohibiting racial discrimination by a small private school for children. This is shown by contemporaneous construction of the Amendment by this Court in the *Slaughter-House Cases*, 16 Wall. 36 (1872), decided only seven years after ratification of the amendment, and

the *Civil Rights Cases*, 109 U.S. 3 (1883), decided eighteen years after ratification. In the *Slaughter-House Cases*, the Court stated that the amendment was intended to complete the emancipation of slaves commenced by President Lincoln with his Emancipation Proclamation, by placing it in the Constitution where it could not be questioned, and said that "its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated."

In the *Civil Rights Cases* the Court said that the necessary incidents of slavery were compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, which were the inseparable incidents of slavery. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, by enactment of the Civil Rights Act of 1866, undertook to wipe out these burdens and disabilities. But Congress did not assume under the authority of the Thirteenth Amendment to adjust the social rights of men and races in the community. "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery."

The legislative history of the Amendment shows such power was not given to Congress. In the House the debate shows that the intent was to abolish slavery, giving to the freedmen the same rights under the Constitution and Bill of Rights as other freemen. Chairman Wilson of the House Judiciary Committee said that slavery denied constitutional rights to whites as well as to slaves and denied them the privileges and immunities of citizens of the United States,

including First Amendment rights. In the Senate the debate was along the same lines, it being clear that the intent was to abolish slavery and prevent its existence thereafter.

President Lincoln's support of the Amendment shows that such broad power was not intended to be given to Congress. Although Lincoln was a prime mover for the adoption of the Thirteenth Amendment he was as fully committed to discrimination between the races as he was to the abolition of slavery, as shown by statements in a number of his speeches, especially during the Lincoln-Douglas debates.

There is no rational basis for reading such a purpose or grant of power into the amendment. 110 years after the abolition of slavery, there is no rational connection between the abolition of slavery and its necessary incidents and racial discrimination by a small private school for children.

II.

42 U.S.C. § 1981, which was derived from the Civil Rights Act of 1866, does not reach private discrimination by a small private school for children. The legislative history of the Civil Rights Act of 1866 shows that Congress had no such intent. As originally introduced the bill contained language declaring that "there shall be no discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery." As finally enacted, this language was deleted.

Chairman Trumbull of the Senate Judicial Committee introduced the bill and was its principal advocate. He maintained that the purpose of the bill was to make the

freedmen citizens of the United States and wipe out the restrictions imposed upon the freedmen by the Black Codes, which were the very same restrictions imposed upon the slaves by the Slave Codes, thereby securing to the freedmen the same privileges all other freemen had, which were the great fundamental rights to acquire property, to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. "Civil rights" did not include political or social rights. Objections were expressed as to the language declaring that there shall be no discrimination in civil rights on account of race, color or previous condition of slavery. It was feared that such language was subject to a broad construction, that for example it might be applied to segregated schools for white and Negro children that existed in some of the States.

In the House of Representatives, where Chairman Wilson of the Judiciary Committee floor managed the bill, the same objections were raised. Wilson at the outset said that the language of the bill did not mean that in all things civil, social, political, all citizens, without distinction of color, shall be equal. Suffrage, for example, was a political right left to the control of the States. Nor did it mean that all citizens shall sit on the juries, or that children shall attend the same schools. These, he said, are not civil rights. He understood civil rights to be the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. He also said that the bill merely affirmed existing law, that it would establish no new right, declare no new principle. A number of Congressmen feared that the language prohibiting discrimination in civil rights might be broadly construed to apply to existing separate schools for whites and black in some states, and to miscegenation laws. The attack upon the objectionable lan-

guage was led by Bingham of Ohio, a Radical Republican who was to be the principal draftsman of Section 1 of the Fourteenth Amendment. Although Wilson denied that the term civil rights included any more than the fundamental rights he had mentioned, and did not include attendance at schools or other matters that were within the domain of the States, he eventually capitulated in order to obtain passage of the Bill, the objectionable language was stricken, and the Bill as amended passed both Houses.

After it was vetoed by President Johnson, in debate in the Senate, Senator Johnson of Maryland, referring to the rights in the latter part of Section 1 of the bill, said:

> ". . . What are they? The declaring who may be authorized to make contracts and who may be authorized to enforce contract, who may be authorized to sue, to be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal estate."

The legislative history of the Civil Rights Act of 1866 shows that its purpose was to give United States citizenship to the freedmen by virtue of which they would have the same pre-existing fundamental rights as all citizens of the United States, no more and no less. At the same time the disabilities imposed by the Black Codes would be struck down. It was not intended to give any persons the new and unheard-of power to coerce others into entering into "contracts" with them, such compulsory "contracts" being one of the evils imposed by the Black Codes.

The "Badges and Incidents" interpretation of the Thirteenth Amendment cannot rationally be extended to bring racial discrimination by a small private school for children within the scope of the Civil Rights Act of 1866,

or § 1981. In *Jones v. Mayer Co.*, 392 U.S. 409, the Court held that 42 U.S.C. § 1982 required an unwilling seller to sell residential real estate to a Negro purchaser upon the same terms that the seller would be willing to sell to a white purchaser. The Court said that Congress obtained its authority to enact the Civil Rights Act of 1866 (the precursor of § 1982 and § 1981) under the Thirteenth Amendment which abolished slavery – that the amendment abolished not only slavery but the "badges and incidents" of slavery – and that refusal to sell real property to a Negro because of his race was one of the badges and incidents of slavery. As its authority for the "badges and incidents" portion of its holding the Court cited the *Civil Rights Cases, supra.* In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), the rationale of *Jones* was applied in cases involving the denial on account of race of rights connected with residential real estate. In *Sullivan* only § 1982 was involved. In *Tillman* both §§ 1981 and 1982. *Jones* was also followed in *Johnson v. Railway Express Agency*, 95 S. Ct. 1716 (1975), involving a claim under § 1981 for discrimination in employment.

But the Court in the *Civil Rights Cases* did not give to "badges and incidents", or to what it also called the "necessary incidents" or the "inseparable incidents" of slavery the broad interpretation given in *Jones.* The badges or servitudes which the Court in the *Civil Rights Cases* considered to have been abolished along with slavery were of a distinctly servile character, clearly relating to the condition or status of a slave, including disabilities as to the making and enforcing of contracts, acquisition and holding of property, and the like, and were not of the nature of discriminations on account of race or color, which the Court in the *Civil Rights Cases* made it quite clear were *not* af-

fected by the Thirteenth Amendment. This, taken together with the expressed statements of the bill's manager in the House, that it would not apply to segregated schools, and the deletion of language originally in the bill declaring that "there shall be no discrimination in civil rights . . . on account of race, color, or previous condition of slavery," would militate against the application of the "badges and incidents" concept to private schools.

III

The Court of Appeals construed and applied § 1981 so as to violate constitutionally protected rights of personal liberty, privacy and freedom of association. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Norwood v. Harrison*, 413 U.S. 455 (1973), constitutionally protected rights of parents to send their children to private schools of their choice, with curricula of their choice, their right not to send their children to high school if contrary to their religious beliefs, and the right to exercise private bias in segregated private schools, were all recognized.

The inapplicability of the equal protection clause of the Fourteenth Amendment to associations exercising the right of private bias was recognized in *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) and *Gilmore v. City of Montgomery*, 417 U.S. 566 (1974). The First Amendment right of freedom of association was recognized in *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), and the right of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). In *Griswold* the privacy violated by the anti-contraceptives statute was held to be in a zone of privacy created by several fundamental constitu-

tional guarantees, and included rights protected by the First, Third, Fourth, Fifth and Ninth Amendments.

In its construction and application of § 1981 to petitioner's school the Court of Appeals has misconceived and misapplied this Court's rationale in *Sullivan* and *Tillman*, and has failed to distinguish as it should between the purely commercial transactions in *Jones*, *Sullivan* and *Tillman*, and the intimate personal relationship that exists in a small private school for children. The court below should not have construed and applied § 1981 so as to abridge constitutionally protected rights, another and constitutional construction being reasonably possible. *United States v. Vuitch*, 402 U.S. 62 (1971); *Arnett v. Kennedy*, 416 U.S. 134 (1974); and *Graham v. Richardson*, 403 U.S. 365 (1971).

IV

Because the district court had denied class action status to the respondents, and the uncontradicted evidence of the respondents showed that there was no continuing or threatened injury to them, there was no basis for the award of individual injunctive relief, and the Court of Appeals erred in affirming the award. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Indianapolis School Commissioners v. Jacobs*, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975); *Moose Lodge v. Irvis*, *supra*.

ARGUMENT

I

THE THIRTEENTH AMENDMENT DID NOT EMPOWER CONGRESS TO ENACT A STATUTE PROHIBITING RACIAL DISCRIMINATION BY A SMALL PRIVATE SCHOOL FOR CHILDREN.

A. Contemporaneous Construction of the Amendment Shows Such Power Was Not Given to Congress

The language of the Thirteenth Amendment is plain and unambiguous. As stated in *The Slaughter House Cases*, 16 Wall. 36, 68 (1872), decided only seven years after ratification of the amendment:

> ". . . The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have the power to enforce this article by appropriate legislation.

"To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government – a declaration designed to establish the freedom of four millions of slaves – and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

"That a personal servitude was meant is proved by the use of the word 'involuntary', which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the pur-

pose of the article might have been evaded, if only the word slavery had been used. . . ."

In the *Civil Rights Cases*, 109 U.S. 3, 20 (1883), decided eighteen years after ratification, this Court said of the Amendment:

". . . By its own unaided force and effect it abolished slavery, and established universal freedom . . .

* * *

"The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence,

and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

"We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery . . . The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. . . ." *Id.*, 22.

* * *

"The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." *Id.*, 24.

B. Legislative History of the Amendment Shows Such Power Was Not Given to Congress

(1) *House of Representatives*

The joint resolution proposing adoption of the Thirteenth Amendment was introduced in the House by Congressman Wilson of Iowa, Chairman of the House Judiciary Committee and co-author of the amendment. His speech in its support is replete with statements showing that its sole purpose was to abolish the institution of slavery, thereby making freemen of the former slaves, who would have the same rights under our Constitution and Bill of Rights as other freemen. He pointed out that the "proposition introduced no intricate question of constitutional law for discussion." Cong. Globe, 38th Cong., 1st Sess., 1200. He dwelt at length upon the evils of the institution of slavery. Slavery, he said, is "defined to be 'the state of entire subjection of one person to the will of another.'" *Id.*, 1200. Repeatedly he charged that "slavery is incompatible with a free Government." *Id.*, 1200.

In enlarging upon this charge he discussed the various objects set forth in the preamble to the Constitution, and showed how the institution of slavery opposed each. When he came to the last of them he said:

> "The last, the grandest, the most sublime of the objects declared by the people in the ordination of the Constitution is, 'to secure the blessings of liberty to ourselves and our posterity.'" *Id.*, 1202.

He quoted Jefferson:

> "Can the liberties of a nation be thought secure when we have removed their only

> firm basis, a conviction in the minds of the people that these liberties are the gift of God; that they are not to be violated but with His wrath?" *Id.*, 1202.

He said that there could not be peace (the Civil War was then raging) while liberty and slavery both existed in the land, and that the way to have peace was to let slavery die, to "let its death be written in our Constitution. Let the Constitution 'proclaim liberty through the land to all the inhabitants thereof.'" *Id.*, 1202.

He contended that "throughout all the dominions of slavery republican government, constitutional liberty, the blessings of our free institutions were mere fables." *Id.*, 1202. And he charged that "slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several states." *Id.*, 1202.

He stated that slavery denied constitutional rights to whites as well as to slaves and denied them the privileges and immunities of citizens of the United States, including the First Amendment rights of "freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition" *Id.*, 1202, 1203.

He pointed out that although the President had by proclamation stricken the chains from millions of men, "we have made some men free, but the system yet lives. . . ." *Id.*, 1203. He concluded by urging that the resolution be approved and the proposition submitted to the several states, which would "at once remove from Congress the question of slavery," and that if the members of the present Congress should fail to do this then their successors would "be more obedient, for the people have decreed that slavery

shall die, and that its death will be recorded in the Constitution." *Id.*, 1203.

(2) *Senate*

In the Senate, Senator Trumbull of Illinois, chairman of the Senate Judiciary Committee, a former state supreme court Justice and a friend of Abraham Lincoln,[1] introduced the measure and was its chief advocate. As he stated it, the proposition was

> "so to amend the Constitution of the United States as forever to prohibit slavery within its jurisdiction, and authorize the Congress of the United States to pass such laws as may be necessary to carry this provision into effect." Cong. Globe, 38th Cong., 1st Sess., S. p. 1313.

He charged that slavery had caused the Civil War, that slavery had denied freedom of speech and of the press in the Southern states. *Id.*, 1313. He said that presidential proclamations and certain laws enacted by Congress had been "ineffectual to the destruction of slavery." *Id.*, 1314.

After arguing that slavery could not be abolished throughout the land by legislation not having constitutional authorization, he said:

> "Then, sir, in my judgment, the only effectual way of ridding the country of slavery, and so that it cannot be resuscitated, is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. This amendment adopted, not

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[1] Avins, *The Reconstruction Amendments' Debates*, 1967, p. vi.

> only does slavery cease, but it can never be reestablished by State authority, or in any other way than by again amending the Constitution." *Id.*, 1314.

At a later point he said:

> "We relieve Congress of sectional strifes, and, what is better than all, we restore to a whole race that freedom which is theirs by the gift of God, but which we for generations have wickedly denied them." *Id.*, 1314.

In conclusion, he said that he looked for military victory during the coming campaign,

> "and with that result, if we civilians do our duty, we shall have the authority of the Constitution vindicated, constitutional liberty reestablished, the Union restored, and freedom everywhere proclaimed." *Id.*, 1314.

In the course of the debate, while opposing changes in the language of the amendment, he said:

> "I was very much tempted to reply to some of the remarks that have been made in opposition to this proposed amendment, and am strongly tempted also to reply to some of the remarks which have fallen from the Senator from Massachusetts, who in an elaborate argument has attempted to show that no amendment of the Constitution is necessary; but, sir, if we can have a vote on this subject I will forego making any reply to what has been said, and will content myself with the passage of the resolution, which is

> the object I have in view, to abolish slavery and prevent its existence hereafter. The language as reported by the committee will accomplish these objects; and although it may not be the best possible form to the mind of every Senator here I wish him to reflect that it is impossible for us all to agree upon the language. We have discussed this matter in committee. . . ." *Id.*, 1488.

The language of the Thirteenth Amendment was taken from the Ordinance of 1787 for the Northwest Territory. *Bailey v. Alabama*, 219 U.S. 219, 240 (1911). Article VI of the Articles of Compact which were ordained by that Ordinance provided as follows:

> Article VI.
>
> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid . . . (Rev. Stat. of the United States (1878), 13-16.)

In arguing in support of the resolution, Senator Howard of Michigan said:

> ". . . Now, sir, I wish as much as the Senator from Massachusetts in making this amendment to use significant language, language that cannot be mistaken or misunderstood; but I pre-

> fer to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals, a phrase, I may say further, which is peculiarly near and dear to the people of the Northwestern Territory, from whose soil slavery was excluded by it. I think it is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause. I hope we shall stand by the report of the committee." Cong. Globe, 38th Cong., 1st Sess., 1864, p. 1489.

C. President Lincoln's Support of the Amendment Shows Such Power Was Not Intended to Be Given to Congress.

President Lincoln was a prime mover for the proposal and adoption of the Amendment.

> "The matter which the President had most at heart was the adoption of a constitutional amendment abolishing slavery in the United States forever. The reader will call to mind that though such an amendment had passed the Senate at the previous session it had failed to secure the requisite two-thirds vote in the House. It was still the same House of Representatives, but the President pointed out

> that the voice of the people as exhibited in the national election was for the amendment and that the House which should come into being March 4, 1865 would certainly pass it: therefore as it is certain to go to the States for their action 'may we not agree that the sooner the better.'" (Rhodes, *History of the United States*, 1904, Vol. V at 48.)

Previously, on July 8, 1864, he had issued a proclamation to the people in which he "expressed his strong hope that the thirteenth amendment, for the time held up, would within a few months be adopted." Hosmer, *The Outcome of the Civil War*, at 143 (Vol. 21, Hart, *The American Nation: A History*, 1905 ed.)

Lincoln's hatred for slavery was of long standing. Yet he had definite and positive views as to race differences between Negroes and whites, and was as fully committed to discrimination between the races as he was to the abolition of slavery.[2]

D. There Is No Rational Basis for Reading Such A Purpose or Grant of Power into the Amendment

Thus we have an Amendment written in plain and simple language, whose legislative history and historical background, and whose interpretation by this Court soon after its adoption, and by the President who urged its adoption, all overwhelmingly support its construction as abolishing slavery and

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[2] See, e.g., his speech at Springfield, Ill., June 26, 1957, Nicolay and Hay, *Complete Works of Abraham Lincoln*, 1894, Vol. 2, p. 315, 329-339; his speech at Springfield, Ill., July 17, 1858, *ibid.*, Vol. 3, p. 155, 186-187; joint debate with Douglas at Ottawa. Ill., August 21, 1858, *ibid.*, Vol. 3, p. 223, 227-230; joint debate with Douglas, Charleston, Ill., September 18, 1858, *ibid.*, Vol. 4, pp. 89-91.

its necessary incidents, and nothing more. No one has better stated one of the cardinal rules for construction of statutes, equally applicable to constitutional amendments, than Jefferson in his letter of June 12, 1823, to Judge William Johnson:

> ". . . Laws are made for men of ordinary understanding, and should therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure. . . ." *The Writings of Thomas Jefferson*, Memorial Edition, 1904, Vol. XV at 450.

Section 2 of the amendment limits Congress to the enactment of "appropriate" legislation to enforce the amendment, and cannot be read to give Congress any power extending beyond the scope and effect of Section 1.

Can it rationally be said that discrimination against Negroes by a small private school for children has anything whatever to do with slavery, or involuntary servitude, or the necessary incidents or badges and incidents of either? The Amendment did not abolish discrimination, or prejudice, or informed choice, or personal preference by parents as to what kind of private school their children should attend, or what kind of children their children should associate with in the school. Neither did it abolish discrimination, or prejudice, or informed choice, or personal preference by the owners or operators of private schools as to what kind of children they would admit in their schools, what kind of children they would instruct. Can it rationally be said today, 110 years after the abolition of slavery in this land, that a preference or prejudice against association with Negro children, or against taking

them into a private school for children, on the part of parents or private school owners or operators, is in any way connected with that long-dead institution?

II

42 U.S.C. § 1981, WHICH WAS DERIVED FROM THE CIVIL RIGHTS ACT OF 1866, DOES NOT REACH RACIAL DISCRIMINATION BY A SMALL PRIVATE SCHOOL FOR CHILDREN.

A. The Legislative History of the Civil Rights Act of 1866 Shows Congress Had No Such Intent.

(1) *Senate*

On January 5, 1866, Senator Trumbull of Illinois, Chairman of the Senate Judiciary Committee, introduced in the Senate the bill that with significant alterations became the Civil Rights Act of 1866. Cong. Globe, 39th Cong., 1st Sess., 129. As introduced, Section 1 of the Bill, after conferring citizenship on native-born Negroes, provided in Section 1:

> "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and

> to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. (Cong. Globe, 39th Cong., 1st Sess., 211, 474.)

As finally enacted, however, Section 1 provided:

> Be it enacted . . . That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. (Civil Rights Act of April 9, 1866, ch. 31, Sec. 1, 14 Stat. 27 (1866).)

It will be noted that the language prohibiting "discrimination in civil rights and immunities . . . on account of race, color, or previous condition of slavery", contained in the Bill, is omitted from the Act as passed. The fears and objections expressed during the course of the debate, which resulted in

the deletion of that language from the Bill, will be reported *infra.*

Trumbull said that the bill was intended to "secure all persons within the United States practical freedom," which meant securing "privileges which are essential to freemen." He reviewed the restrictions on slaves under the Slave Codes and pointed out that after the abolition of slavery the South had adopted Black Codes which "still impose upon them [the freedmen] the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment." *Id.*, 474.

Trumbull concluded by stating that the bill would make all persons born in the United States citizens, irrespective of race or color, so that the freedmen would be entitled to the rights of citizens, and that the rights of citizens are

> "the great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts; and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman." *Id.*, 475.

When Trumbull had finished, he was asked by Senator McDougall of California what was meant by "civil rights" in Section 1 of the Bill. Trumbull answered by reciting the enumeration of rights in Section 1. McDougall then asked:

> ". . . Do I understand that this bill does not go further than to give protection to the enjoyment of life and liberty and the pursuit of happiness and the protection of the courts, and to have

> justice administered to all? Do I understand that it is not designed to involve the question of political rights?"

To which Trumbull replied:

> "This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." *Id.*, 476.

In Bickel, *The Original Understanding and The Segregation Decision,* 69 Harv. Law Rev. 1, 13 (1955), which contains a masterful review and analysis of the legislative debates on the Civil Rights Act of 1866 at pages 11 to 29, it is stated:

> "With the single exception of Lot M. Morrill of Maine, a Radical who, looking beyond the bill at hand, expounded a theory of the equality of the races, others – Radicals and Moderates alike – who spoke in favor of the bill were content to rest on the points Trumbull had made. The rights to be secured by the bill were those specifically enumerated in Section 1, and the necessity for extending the protection so defined was demonstrated by the Black Codes enacted by Southern legislatures. On its merits, this argument had one or two weaknesses. It disregarded the general civil rights guaranty which preceded the enumeration of rights in Section 1, and, in directing attention only to evils existing in the South, it ignored the fact that the bill was to apply throughout the nation. . . ."

Senator Sherman of Ohio, who voted in favor of the bill, said as to Section 1 that it:

> "defines what are the incidents of freedom, and says that these men must be protected in certain rights, and so careful is it in its language that it goes on and defines those rights, the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and other universal incidents of freedom." *Id.*, 744.

The language in Section 1 of the bill that "there shall be no discrimination in civil rights . . . on account of race, color, or previous condition of slavery . . ." was found especially disturbing by Senators Saulsbury of Delaware, a Democrat, Cowan of Pennsylvania, a Republican, and Johnson of Maryland, a Democrat. It was their contention that notwithstanding the limited construction given to the term "civil rights" by Trumbull, that language caused the bill to exceed the powers of Congress under the Thirteenth Amendment and could be open to a construction by the courts that would be contrary to the intention of Congress.

Saulsbury argued that the term "civil rights" in the bill comprehended more rights than Trumbull had enumerated, even though Trumbull had no intention of conferring other rights, such as the political right of suffrage, and that therefore the bill exceeded the authority of Congress under the Thirteenth Amendment, which only abolished slavery, as it could not be said that there was a legal and logical connection between the abolition of slavery and the conferring of such rights. Cong. Globe, 39th Cong., 1st Sess., 476-478.

Senator Cowan:

> "Now, as I understand the meaning and intent of this bill, it is that there shall be no dis-

> crimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house, and the white children over in that schoolhouse, and educate them there as best we can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. How anybody desiring to be fair, desiring to construe the Constitution according to its fair intent and meaning, can drag out of it such a conclusion, such a monstrous conclusion as this, I cannot see." *Id.*, 500.

Bickel analyzed Johnson's argument as follows:

> "Reverdy Johnson, Democrat of Maryland, one of the great lawyers of his time, offered an analysis of the bill which came to the same point Saulsbury had made. The states, in the exercise of their police power, had always, and

had, in Johnson's opinion, properly taken account of the prejudices of the people. When legislators failed to do that, they created the sort of situation which had resulted from the passage of the Fugitive Slave Act; they passed unenforceable legislation. 'I mention that,' said Johnson, 'for the purpose of applying it to one of the provisions of this bill.' Most states had legislated against miscegenation. Yet this bill, Johnson believed, would wipe all such legislation off the books. Trumbull and William Pitt Fessenden of Maine, like Trumbull a Moderate, interrupted to dispute this interpretation. Negroes could not marry whites and whites could not marry Negroes, they argued; hence there could be no discrimination in a miscegenation statute. But neither Fessenden nor Trumbull answered Johnson's broader point, which was that even if his interpretation was wrong, the error was not 'so gross a one that the courts may not fall into it.'" Bickel, *supra*, at 15.

(2) *House of Representatives*

The bill was introduced in the House by Congressman Wilson of Iowa, Chairman of the House Judiciary Committee and floor manager of the bill in the House, who first reported that the Committee proposed to amend Section 1 by striking out the words "inhabitants of" and inserting the words "citizens of the United States in", so that it would read:

> "There shall be no discrimination in civil rights or immunities among the citizens of the United States in any State or territory [of the United States on account of race, color, or previous condition of slavery] . . ." Cong. Globe, 39th Cong., 1st Sess., 1115.

The amendment was passed.

After discussing the law as to who are citizens of the United States, Wilson launched into his argument as to the principal features of Section 1:

> "This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities.' What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a Republican form of government. *Nor do they mean that all citizens shall sit on the juries, or that children shall attend the same schools. These are not civil rights or immunities.* Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as –

> 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' 'Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.' Kent's Commentaries, Vol. 1, p. 199.
>
> ". . . From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic." (Emphasis supplied) *Id.*, 1117.

After defining the term "immunities" he went on to say:

> "Mr. Speaker, I think that I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms the existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. . . . *Id.*, 1117.

Again he listed the great fundamental rights which it was the object of the bill to protect:

"What are these rights? Certainly they must be a comprehensive as those which belong to Englishmen. And what are they? Blackstone classified them under three articles, as follows:

1. The right of personal security; which, he says, 'Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'

2. The right of personal liberty; and this, he says,

'Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.'

3. The right of personal property; which he defines to be,

'The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.'
- Sharswood's Blackstone, Vol. 1, chap. 1.

"In his lecture on the absolute rights of persons, Chancellor Kent (Kent's Commentaries, volume one, page 599) says:

'The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable. . . .'" *Id.*, 1118.

As stated in Bickel:

> "Wilson thus presented the Civil Rights Bill to the House as a measure of limited and definite objectives. In this he followed the lead of the majority in the Senate. Indeed, his disclaimers of wider coverage were more specific than those made in the Senate. And the line he laid down was followed by others who spoke for the bill in the House. Again, the Black Codes were referred to and again the point was made that the term civil rights was defined by Section 1, which enumerated the rights in question." Bickel, *supra*, at 17.

For Radicals such as Cook of Illinois, Thayer of Pennsylvania, and Windom of Minnesota, the Black Codes were the evil to which the bill was directed. Cong. Globe, 39th Cong., 1st Sess., 1123-25, 1151, 1160. As to what the bill was intended to do, and what it was *not* intended to do, Windom stated:

> ". . . It does not, as I have already said, confer the privilege of voting, for that is a political right, and not included in the bill. It does not attempt to confer on the freedmen social privileges. It merely provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest right of human nature, the right to exist. Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil." *Id.*, 1159.

Democrats in the House concentrated their attack upon the language prohibiting "discrimination in civil rights . . . on account of race, color, or previous condition of slavery. . . ."

Shanklin of Kentucky proposed an amendment stating explicitly that nothing in the bill conferred the right to vote. Wilson replied that the bill did not confer that right. *Id.*, 1120. Rogers of New Jersey referred to the separate schools for whites and blacks in Pennsylvania, and to miscegenation laws in the States, both amounting to discrmination on account of race, which was not prohibited by the Constitution. He pointed out that the term "civil rights" was broad and included more rights than those in the bill. Concluding, he said:

> "Now, the constitutional amendment abolishing slavery provides in the second section that 'Congress shall have power to enforce this article by appropriate legislation.' 'Appropriate legislation' for what? What is the subject-matter to which the legislation of Congress is to apply? Slavery or involuntary servitude is forever abolished, and this is to enable Congress to compel a State that undertakes, by its legislative power, to inflict the stigma of slavery again upon the escutcheon of this country, to forbear from so doing. It is to enable Congress to lay the hand of Federal power, delegated by the States to the General Government, upon the States to prevent them from reenslaving the black which it could not do before the adoption of this amendment to the Constitution.
>
> . . . . . .

> "I wait for an argument based upon constitutional grounds showing our right to give Congress this awful power to enter into the jurisdiction of the States of this country, and to prostrate and destroy and break down those grand symbols and principles of liberty which lie at the foundation of our Government. . . ." *Id.*, 1120-1123.

Thornton of Illinois also charged that the term "civil rights" was too broad and subject to latitudinarian construction which could include the right of suffrage. *Id.*, 1157.

As a result of these arguments Wilson moved to amend the bill by adding a new section providing that nothing in the act should be so construed as to affect the laws of any State concerning the right of suffrage, and the amendment was adopted, but Wilson still maintained:

> "I wish to say [that] . . . that section will not change my construction of the bill. I do not believe the term civil rights includes the right of suffrage. Some gentlemen seem to have some fear on that point." *Id.*, 1162.

But this did not satisfy the Democrats. Kerr of Indiana asked about these discriminations, among others:

> "Is it either [slavery or involuntary servitude] to deny children of free Negroes or mulattos the privilege of attending the common schools of a State with the children of a white man? Is it either for a religious society, on the same ground, and in pursuance of its long-established custom, to refuse to a free negro the right to rent and occupy the most prominent pew in its church? . . ."

> "It will require a most vigorous exercise of the imagination to give affirmative answers to these questions. But if these discriminations constitute slavery or involuntary servitude, which are the only things prohibited by the last constitutional amendment, then whose slaves are the persons so discriminated against? They are not the slaves of individuals. They must, then, be the slaves of the State. It follows, therefore, that my State, Indiana, has been a slave State ever since its organization, a fact which its citizens will hardly admit. . . ." *Id.*, 1268.

Moderate Republicans were also concerned about the dangers inherent in the language prohibiting discrimination in civil rights on account of race, color, or previous condition of slavery.

Delano of Ohio made a strong attack upon the bill as exceeding the authority of Congress under the Thirteenth Amendment, and stated his support of an amendment proposed by Congressman Bingham (see, *infra*, at p. 44) to strike from the bill the language "There shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery." Cong. Globe, 39th Cong., 1st Sess., App. March 8, 1866, p. 156. On the question of whether or not the bill would confer the right of being jurors to the freedmen, he quoted the language:

> "To full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens,"

and stated that to him this lanugage necessarily conferred the right of being jurors on the freedmen. *Id.*, 156. In denying that it was intended to do so, Wilson in reply made this extraordinarily significant statement:

> "The words to which the gentleman has directed attention were not in the original bill, but were placed there by an amendment offered by myself. And the reason for offering it was this: it was thought by some persons that unless these qualifying words were incoporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension; and I think the very reason which was urged by those who desired the amendment to be incorporated in the bill, is an answer to the objection which the gentleman makes." *Id.*, 156, 157.

Delano, however, while not disputing that that was the reason for introducing those words into the bill, went on to say, after referring to the bill's declaration prohibiting discrimination in civil rights or immunities among the citizens of the United States in any State or Territory:

> "Now, I suppose that what follows after this is a limitation of this general declaration; and I do not see how the words that I have commented upon are a limitation, because they follow after giving the 'right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey.'

> Then is added this clause, 'and to full and equal benefit of all laws and privileges for the security of person and property, as is enjoyed by white citizens.' It seems to me, therefore, that in the connection in which the words on which I am speaking are found in the bill, they are an enlargement or extension of specific rights enumerated in the bill. The entire clause, enumerating rights, appears to have been a limitation of the first great declaration in the bill, that 'there shall be no discrimination in civil rights or immunities, among the citizens of the United States in any State or Territory.' . . . Now, sir, if I am correct in this thought, I presume that the gentleman himself will shrink from the idea of conferring upon this race now, at this particular moment, the right of being jurors, or from so wording this bill as to leave it a serious question and render it debatable hereafter in the courts or elsewhere." *Id.*, 156, 157.

Bingham of Ohio, a Radical Republican, and one of the most influential men in the 39th Congress, who was to be the principal draftsman of Section 1 of the Fourteenth Amendment, (Bickel, *supra*, p. 22, 25), moved to amend a pending motion to recommit the bill by adding the following:

> "With instructions to strike out of the first section the words 'and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery,' and insert in the thirteenth line of the first

> section, after the word 'right' the words 'in every State and Territory of the United States.' Also to strike out all parts of said bill which are penal, and which authorize criminal proceedings, and in lieu thereof to give to all citizens injured by denial or violation of any of the other rights secured or protected by said act an action in the United States courts with double costs in all cases of recovery, without regard to the amount of damages: and also to secure to such persons the writ of *habeas corpus.*" Cong. Globe, 39th Cong., 1st Sess., 1271-72.

Bingham argued that the entire bill was unconstitutional because unauthorized by the Thirteenth Amendment and in violation of powers reserved by the States under the Constitution. His purpose was to make the bill less oppressive, less unjust. Cong. Globe, 39th Cong., 1st Sess., 1291-1293; also, see Bickel, *supra*, at p. 26. He objected strongly to the language which his motion would strike from the bill. His definition of "civil rights" was much broader than Wilson's. He said:

> "the term 'civil rights' includes every right that pertains to the citizen under the Constitution, laws, and Government of this country. . . Under the Constitution of the United States every natural-born citizen of the Republic is, in some sense, a partner in the Government, although he may take no active part in it. . . the term 'political rights' is only a limitation of the term 'civil rights', and by general acceptation signifies that class of civil rights which are more directly exercised by the citizen in con-

nection with the government of his country. If this be so, are not political rights all embraced in the term 'civil rights', and must it not of necessity be so interpreted? . . .

"If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State Constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I may say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights." Cong. Globe, 39th Cong., 1st Sess., 1291.

Wilson, answering Bingham, said:

"The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the government; that in the term are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. My friend is too sound a lawyer, is too well versed in the Constitution of his country, to endorse that proposition on calm and deliberate consideration. He knows, as every man

> knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this bill can only relate to matters within the control of Congress.
>
> "He says that we cannot interpose in this way for the protection of rights. Can we not? What are the great civil rights to which the first section of the bill refers? I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States." *Id.*, 1294.

By vote the bill was recommitted, and was brought back in four days by Wilson, who reported a committee amendment striking from Section 1 the civil rights provision Bingham had objected to. He said:

> ". . . The amendment which has just been read proposes to strike out the general terms relating to civil rights. I do not think it materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended. . . ." *Id.*, 1366.

With respect to the amendment that nothing in the bill should be construed to affect or interfere with the right of suffrage, Wilson said:

> ". . . Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section. Therefore the amendment referred to by the gentleman is unnecessary." *Id.*, 1367.

Two days later the Senate concurred in the House amendments. *Id.*, 1366-67. It was vetoed on constitutional grounds. The veto was overridden by the Senate on April 4 and by the House on April 9, 1866. In the debate in the Senate to override the President's veto, it is of special interest that Senator Johnson of Maryland, in discussing the "rights which are referred to in the latter part of this section [Section 1]," said:

> . . . What are they? The declaring who may be authorized to make contracts and who may be authorized to enforce contracts, who may be authorized to sue, to be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal estate. . . . *Id.*, 1777.

B. The Limited Scope of the Act as Intended by Congress Is Clear from Its Legislative History.

It is clear from the foregoing review of the legislative history of the Civil Rights Act of 1866 that it was not the intent of Congress to prohibit racial discrimination, or to give to the Negro or to members of any other ethnic or racial group, or to any person whatever, the right or power to compel unwilling persons to make "contracts" with them.[3]

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[3] This is directly opposed to the reading of the Act's legislative history by the Court in *Jones v. Mayer Co.*, 392 U.S. 409 (1968), in which Justices Harlan and White dissented – a reading that has been much criticized in the legal literature. See, *e.g.*, Casper, *Jones v. Mayer, Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 99-126; Henkin, *Foreword: On Drawing Lines, The Supreme Court*, 1967 Term, 82 Harv. L. Rev. 63, 96-97, 99-101 (1968); Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 Vand. L. Rev. 485, 495-97 (1969); Comment, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc.*, 122 U. Pa. L. Rev. 471, 474 (1973); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 Geo. L. J. 1363, 1372 (1974). See also, antedating *Jones:* Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 So. Cal. L. Rev. 274, 296-306 (1967). (For a defense of the Court's interpretation of the "ambiguous statutory language of section 1982", see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum. L. Rev. 449, 468-469 (1974).) Nevertheless, the holding in *Jones* has been followed by this Court in *Sullivan v. Little Hunting Park*, 396 U.S. 299 (1969) in which the Chief Justice and Mr. Justice White dissented, in *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), and in *Johnson v. Railway Express Agency*, 44 L.Ed. 2d 295 (1975).

What Congress intended to do by the Act was to give to the freedmen and their descendants the same pre-existing fundamental civil rights (as that term was understood and defined by Congress) as were and had been possessed by citizens of the United States from the time of the adoption of the Constitution, which had been reinforced and made crystal-clear by the adoption of the Bill of Rights. Some of the members of Congress believed that the freedmen had become citizens of the United States automatically upon the adoption of the Thirteenth Amendment. To them, the provision of the Act making every person born within the United States a citizen of the United States (with certain exceptions not here material) was merely declaratory of what was already the legal status of the freedmen, and was the legal status of every person born within the United States not subject to a foreign power. To others, who accepted the holding in *Dred Scott*[4] that free Negroes were not citizens, the Act would make them such, under the power given Congress over naturalization in Article 1, Section 8 of the Constitution. Included among the pre-existing fundamental civil rights of all citizens of the United States were those expressly enumerated in Section 1 of the Act, such as the right to make and enforce contracts, and to inherit, purchase, lease, hold, and convey real and personal property. These, and the other rights enumerated in Section 1, were the rights that slaves had been disabled from exercising under the Slave Codes, and that freedmen were disabled from exercising under the Black Codes, and it was these specific civil rights which the statute was intended to secure, and those specific disabilities that the statute struck down. As stated by Chairman Wilson of the House Judiciary Committee,

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[4] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

> . . . We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen . . . Cong. Globe, 39th Cong., 1st Sess., 1117.

It is clear that the bill was not intended to create new social rights, or to operate at all in the area of social relations; and *that it was not intended to have any effect upon the maintenance within the States, of separate, segregated schools for white and Negro children.*

Supporters of the bill were as emphatic as its opponents in their expressions of determination to retain and protect the fundamental rights of all citizens of the United States under the Constitution and Bill of Rights. *Those rights were to be retained and enforced for all, were not to be altered in any way, were not to be enlarged for the benefit of persons who are discriminated against on account of their race, at the cost of diminishing them for the discriminators.*

The legislative history of the Freedmen's Bureau Bill, which was introduced and debated at the same time as the Civil Rights Bill, and which had a "similar" and "largely parallel . . . structure" and was "drafted by the same hand,"[5] is enlightening on the question of whether Congress intended with respect to the specific right to make contracts referred to in Section 1 of the bill, to authorize coercion or duress in the making of contracts (a contradiction in terms).

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[5] Dissenting opinion of Mr. Justice Harlan, concurred in by Mr. Justice White, *Jones v. Mayer Co., supra,* 392 U.S. 409, 457.

In the course of the debate on the Freedmen's Bureau Bill, Congressman Elliot said:

> "Wherever there has been interruption of civil law, it was found impossible that the rights of freedmen could be asserted in the courts and where there were no courts before which their rights could be brought for adjudication, military tribunals, provost-marshals' courts, were established for the purpose of determining upon questions arising between freedmen or between freedmen and other parties; and that also has been continued to this day.
>
> "The commissioners were instructed to permit the freedmen to select their own employers and to choose their own kind of service. All agreements were ordered to be free and mutual, and not to be compulsory . . ." Cong. Globe, 39th Cong., 1st Sess., 514.

Congressman Donnelly commented on the Black Codes that had been adopted in several of the former Slave States after the War. As to the Black Code of South Carolina he stated:

> "the adult Negro is compelled to enter into a contract with a master, and the district judge, not the laborer, is to fix the value of the labor. If he thinks the compensation is too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate again to be fixed by the judge. If a hired Negro leaves his employer he forfeits his wages for the whole year." *Id.*, 588.

Under the Black Code of Virginia, he said:

> ". . . any man who will not work for the 'common wages given to other laborers' shall be deemed a vagrant; the masters have formed combinations and have put down the rate of wages to the freedmen below a living price; the Negro refusing to work for these wages is seized as a vagrant; sold to service 'for the best wages that can be procured' for three months; if he runs off he shall work another month with ball and chain for nothing." *Id.*, 589.

Compulsory "contracts" were among the very evils that the companion Civil Rights and Freedmen's Bureau Bills were intended to correct. It is clear from the legislative history of these bills that it was not the intention of Congress to substitute their own set of coerced "contracts" for those complained of, equally violating the fundamental constitutional rights which it was their avowed intention to protect for all. It is difficult indeed to believe that the distinguished lawyers who participated in the drafting of this legislation and in the debates meant coerced relationships when they said "contracts."

C. The "Badges and Incidents" Interpretation of the Thirteenth Amendment Cannot Rationally Be Extended to Bring Racial Discrimination by a Small Private School for Children Within the Scope of the Civil Rights Act of 1866, or § 1981.

We have reviewed the legislative history, historical background and contemporaneous construction of the Thirteenth Amendment, *supra*, at pages 17 to 29. They, and the clear and simple language of the amendment itself, show that it was intended to abolish slavery and its necessary incidents, and nothing more. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, this Court said that Section 2 of the amendment "clothed Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,"[6] and that

> ". . . Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Id.*, 440.

In *Jones* this Court determined that it was within the authority of Congress under the Thirteenth Amendment to prohibit refusal to sell residential real estate to a Negro on account of his race, and that under the Civil Rights Act of 1866, precursor of 42 U.S.C. Sections 1981 and 1982, and specifically in Section 1982, Congress had prohibited such refusal. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court extended its holding in *Jones* to include rights connected to residential real estate, and reaffirmed that extension in *Tillman v. Wheaton-Haven Recreation Ass'n*,

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[6] The Court was quoting from the opinion of Mr. Justice Bradley for the Court in the *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

410 U.S. 431 (1973). In *Tillman* there were claims under § 1981 as well as under § 1982. These were claims by two resident members of the recreation association, who were white, and their guest, who was a Negro, based on the refusal of guest privileges at the facility because of the guest's race. It will be noted that each of these cases involved the denial on account of race of the sale, lease, use or enjoyment of residential real property, or rights directly connected therewith. In *Johnson v. Railway Express Agency, Inc.*, 44 L.Ed. 2d 295 (1975), decided after the decision of the court below in the instant case, this Court had occasion for the first time to pass on the question of whether § 1981 applied to discrimination in private employment, and held that it did.

As already noted, the Court in *Jones* at 392 U.S. 439, quoted the majority opinion in the *Civil Rights Cases* as its authority for holding that the Thirteenth Amendment "clothed Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Civil Rights Cases,* 109 U.S. 3, 20 (1883). But it is necessary to know what the Court being quoted meant by "badges of slavery" or "badges and incidents of slavery," – how it defined the term – if it is to be used as a precedent of paramount constitutional importance.

The Court in the *Civil Rights Cases* had no latitudinarian view of the term. It referred to a list of burdens and disabilities of a servile character, incident to feudal vassalage in France, that had been presented in a former case before the Court as "servitudes" or "badges of slavery," and pointed out that these were "servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent." (*Id.*, p. 21) And the Court asked:

> "But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?" (*Id.*, p. 21).

In defining what it at various times called the "badges and incidents", or "necessary incidents", or "inseparable incidents" of slavery, the Court said:

> "Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. (*Id.*, p. 22).
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> . . . . . .
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> "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." (*Id.*, p. 24)
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> . . . . . .

"Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

"After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State. . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business . . .

"There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances

> and places of amusement. *Mere discriminations on account of race or color were not regarded as badges of slavery.* If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments." (Emphasis supplied) *Id.*, 24-25.

We have shown the limited scope of the Act as intended by Congress, what it included, what it excluded. It did not give social rights. It did not give political rights, such as the right of suffrage. It did not give the right to sit on juries. And it did not give the right for Negro children to attend the same schools as white children. Congressman Wilson, Chairman of the House Judiciary Committee and floor manager for the bill, was very explicit about this in his opening speech. Explaining what was meant by the provision for "equality of citizens of the United States in the enjoyment of 'civil rights and immunities'," he said:

> "What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a Republican form of government. *Nor do they mean that all citizens shall sit on the juries, or that children shall attend the same schools. These are not civil rights or*

> *immunities* . . . . (Emphasis supplied) Cong. Globe, 39th Cong., 1st Sess., 1117.

When Congressman Wilson was challenged as to whether the term "civil rights" might not be construed broadly so as to include the right to vote, or the right to sit on juries, or the right to attend the same schools, he denied that it could be. But ultimately, in order to obtain passage of the bill and to allay the fears of some, the bill was amended to strike the objectionable language, and as so amended passed both houses.

It is difficult to conceive of anything that could more conclusively establish that it was not the intent of Congress that the Civil Rights Act of 1866 should apply to schools, than the express language of Congressman Wilson and of those who had fears about a broad construction, and the resulting deletion of the objectionable language from the bill in order to obtain its passage.

III. THE COURT OF APPEALS HAS CONSTRUED AND APPLIED § 1981 SO AS TO VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS OF PERSONAL LIBERTY, PRIVACY, AND FREEDOM OF ASSOCIATION

The debates in Congress on the Civil Rights Act of 1866 are a refreshing discussion of the first principles of this Republic. It is ironic that the statute which emerged has been construed by the district court, and by a bare majority of the full Court of Appeals, in derogation of them. It is noted also that one of the principal arguments advanced by Congressman Wilson for passage of the resolution for adoption of the Thirteenth Amendment, was that slavery denied whites as well as slaves the First Amendment freedoms. See, *supra*, at 22.

In *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1924), the Court said:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 67 L. ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standarize its children by forcing them to accept instruction from public teachers only. The

> child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations."

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that it was the right of Amish parents, under the Free Exercise Clause of the First Amendment, not to send their children to public high school after they had completed the eighth grade, despite the compulsory school attendance law of the State of Wisconsin requiring attendance at school until the age of 16. The Amish believed that their children's attendance at high school was contrary to the Amish religion and way of life, and that by sending their children to high school they would not only expose themselves to the danger of the censure of the church community, but would also endanger their own salvation and that of their children. In holding that the right of the Amish parents under the Free Exercise Clause should prevail over the interest of the State in universal compulsory education for its citizens up to the age of 16, the Court said, at page 232:

> "The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition . . ."

The Court then went on to quote the same passage from the opinion in *Pierce* that is quoted *supra* at 60. It is significant in this connection that the religion of the applicant is a matter of concern with the Fairfax-Brewster

School, which requires it to be stated in its application form, and that grace is said with meals at the School. This religious aspect of the School, which is nonsectarian, cannot help but be a factor in its choice by some parents.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court held that the lending of state-owned textbooks to children attending racially segregated private schools violated the equal protection clause of the Fourteenth Amendment, but reaffirmed the holdings in *Pierce and Yoder* that:

> "A State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Id.*, at 461.

At a later point in its opinion the Court said that private bias such as is exercised by a segregated private school is not barred by the Constitution and does not invoke any sanction of laws. *Id.*, at 469. Again, in *Gilmore v. City of Montgomery*, 417 U.S. 566 (1974), the Court had occasion to pass upon the applicability of the Equal Protection Clause of the Fourteenth Amendment to the use of State facilities by segregated private groups, including private schools. The state of the record in that case was such that the Court could not pass upon some of the questions involved, and the case was remanded for further proceedings with respect to those questions. But in concluding its opinion the Court pointed out:

> ". . . it should be obvious that the exclusion of any person or group–all-Negro, all-oriental, or all-white–from public facilities infringes

> upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in Moose Lodge. He observed, 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.' 407 U.S., at 179-180, 32 L Ed 2d 627. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change . . ." *Id.*, at 575.

In *Bell v. Maryland*, 378 U.S. 226, 313 (1964), Mr. Justice Goldberg in his concurring opinion said:

> "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."

The right of freedom of association was affirmed by the Court in *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), and is now firmly established as a First Amendment right. It is one of the fundamental liberties that are given constitutional protection under the Bill of Rights. So also

is the right of privacy, which was affirmed in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

In *Griswold* a Connecticut law making the use of contraceptives a criminal offense was struck down as an unconstitutional invasion of the right of privacy of married persons. The privacy violated in *Griswold* was said by the Court to concern a relationship lying within the zone of privacy created by several fundamental constitutional guarantees, including rights protected under the First, Third, Fourth, Fifth and Ninth Amendments. Mr. Justice Goldberg, in a concurring opinion in which he was joined by the Chief Justice and Mr. Justice Brennan, said that he agreed that the Connecticut law unconstitutionally intruded upon the right of marital privacy, and that he agreed that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. And he stated that the Ninth Amendment itself was intended to provide protection for fundamental rights not covered in the preceding eight amendments, and is an independent source of rights protected from infringment by either the States or the Federal Government.

In *Roe v. Wade, supra,* the Court held that with certain limitations, the right of privacy embraces a woman's decision whether or not to terminate her pregnancy, which she may exercise notwithstanding the prohibition of a state criminal abortion statute.

Petitioner contends that the Court of Appeals in this case has erroneously construed and applied § 1981 so as to violate the rights of petitioner and rights of parents who patronize it, whether at the time here involved or in the future, which are guaranteed under the First, Fifth

and Ninth Amendments, as well as fundamental rights and liberties not mentioned or embraced within the Bill of Rights. The majority of the Court of Appeals erroneously felt themselves bound by the decisions in *Jones v. Mayer Co.*, 392 U.S. 409 (1968), *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973). Yet none of those cases involved a private school. *Jones* involved the sale of residential real estate, under § 1982. *Sullivan* and *Tillman* involved rights connected with residential real estate. Only in *Tillman* was § 1981 invoked. In both *Sullivan and Tillman* the Court expressly and pointedly held that the association-defendant was not truly private, and gave its basis for that determination. The Court said in *Tillman*:

> "In Sullivan we found it unnecessary to consider limits on § 1982 as applied to a truly private association because we found 'no plan or purpose of exclusiveness' in Little Hunting Park. 396 U.S., at 236, 24 L Ed 2d 386. But here, as there, membership 'is open to every white person within the geographic area, there being no selective element other than race.' *Id.*, at 236, 24 L Ed 2d 386. The only restrictions are the stated maximum number of memberships and, as in Sullivan, 396 U.S., at 234, 24 L Ed 2d 386, the requirement of formal board or membership approval. The structure and practices of Wheaton-Haven thus are indistinguishable from those of Little Hunting Park. We hold, as a consequence, that Wheaton-Haven is not a private club and that it is not necessary in this case to consider the issue of any implied limitation on the sweep of § 1982 when its appli-

> cation to a truly private club, within the meaning of section 2000a(3), is under consideration. Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 32 L Ed 2d 627, 92 S Ct 1965 (1972); Daniel v. Paul, 395 U.S. 298, 23 L Ed 2d 318, 89 S Ct 1697." 410 U.S. at 438.

As to the claim under § 1981, the Court said:

> ". . . In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club. Consequently, our discussion and rejection of Wheaton-Haven's claim that it is exempt from § 1982 disposes of the argument that Wheaton-Haven is exempt from § 1981 . . ." *Id.*, 440.

Although recognizing that petitioner had a plan or purpose of exclusiveness by virtue of its high standards and criteria for admission, the court below fell into the same misconception as the district court as to what this Court had said in *Sullivan* and *Tillman* (following *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969)). What the Court indicated in those cases was that a private association or establishment might not be reached by § 1981 or § 1982 if it had a plan or purpose of exclusiveness and was therefore truly private, notwithstanding that it also practiced racial discrimination.

The Court of Appeals also failed to distinguish between a commercial transaction such as was involved in *Jones*, *Sullivan*, and *Tillman*, and the kind of intimate

personal relationship or status inherent in attendance of children at a small private school.

The three dissenting members of the court below did not consider *Jones, Sullivan* and *Tillman* as being controlling precedents, and therefore considered themselves bound by no definitive decision of this Court. They distinguished between the "right to purchase real estate", and the "right to attend an independent school" inferred from the right to "make and enforce contracts":

> ". . . The purchase of real estate, with its attending perquisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (A. 26)[7]

They also felt that the rationale in *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) had been disregarded by the

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[7] A similar distinction can reasonably be made as to an employment contract such as the one involved in *Johnson v. Railway Express Agency*, 95 S.Ct. 1716 (1975).

majority of the court. They stated that it was not until after the passage of the Civil Rights Act of 1964 that the 1866 act was reactivated; that the 1964 act made no attempt to prevent racial discrimination in the admissions policies of independent schools; and that whatever the intent of the 1866 Congress may have been, the 1964 Congress did not intend to restrict those policies. (A. 28)

They said that Fairfax-Brewster School and Bobbe's School were both small and that intimacy of personal association is important in small schools, so that the constitutionally protected right of freedom of association applies to both. (A. 30-31)

They quoted with approval an approach to the problem suggested in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973), that the right to contract protected in §1981 should be limited to contracts found in secondary, as contracted with primary relationships, the latter being characterized by intimate association, and the former being impersonal, highly formalized relations between people, such as the relationship between buyer and seller. Following the approach suggested in that article, the dissenting judges said admission to the independent schools involves a primary relationship and thus would not be within the scope of § 1981. (A. 31-32)

The Court of Appeals has construed and applied § 1981 so as to abridge constitutionally guaranteed rights. In *United States v. Vuitch*, 402 U.S. 62, 70 (1971), the Court said:

> ". . . statutes should be construed whenever possible so as to uphold their constitutionality."

And in *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) the Court said:

> "We have observed previously that the Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. United States v. 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7, 37 L. Ed. 2d 500, 93 S. C Ct. 2665; United States v. Thirty-seven Photographs, 402 U.S. 363, 368-369, 28 L. Ed. 2d 822, 91 S. Ct. 1400."

See also, *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

IV. THE COURT OF APPEALS ERRED IN AFFIRMING THE AWARD OF INJUNCTIVE RELIEF TO THE RESPONDENTS

Respondents were denied class action status by the district court (A. 138). Therefore, they had to prove their right to individual injunctive relief in order to be entitled to a permanent injunction. This principle is firmly established. *O'Shea v. Littleton*, 414 U.S. 488 (1974). See also, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indianapolis School Commissioners v. Jacobs*, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975); and *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). And see, *Lidie v. State of California*, 478 F.2d. 552 (9th Cir. 1973); *Danner v. Phillips Petroleum Co.*, 447 F.2d. 159 (5th Cir. 1971); *Ridley v. Hopper*, 485 F.2d 1377 (5th Cir. 1973); *Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974). Yet the uncontradicted testimony of the adult respondents (the child did not attend the trial) was that the infant respondent was admitted to another private

school's summer day camp shortly after his rejection by petitioner (A. 182); that he attended that private school for two years (A. 183); that he attended a parochial school for two years (A. 184); that a month before trial respondents moved out of the area, into another county, and that the infant respondent was at time of trial attending a public school there. (A. 184) Clearly, there was no continuing or threatened injury to the respondents individually in the maintaining by petitioner of what the district court had ruled was a racially discriminatory admissions policy.

CONCLUSION

For the foregoing reasons that part of the judgment of the Court of Appeals affirming the judgment of the district court awarding monetary damages to the infant respondent and a permanent injunction to all of the respondents, and a declaratory judgment, should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-66

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, Infant, by
Raymond Gonzales and
Margaret R. Gonzales, his parents,
and

RAYMOND GONZALES and
MARGARET R. GONZALES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. FULL CONSIDERATION OF THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1866 IS NECESSARY TO THE CORRECT DECISION OF THIS CASE

Petitioner devoted a large part of its brief to a detailed review and analysis of the legislative history of the Civil

Rights Act of 1866. In contrast, not a single opposing brief (including those filed by *amici curiae*) concerns itself with legislative history. Instead, it appears that the common tactic of all opponents is simply to cite *Jones v. Mayer*, 392 U.S. 409 (1968), as the final word on the subject. But *Jones* did not involve any question of school integration, and even if the Court's interpretation of the Act's legislative history led to the correct result in that case, it would still be necessary in this case to comb through the legislative history to ascertain, if possible, the specific intent of Congress with respect to the question of integrating schools. This the petitioner did, and it is submitted that it is established beyond dispute that it was the intent of Congress in enacting the Civil Rights Act of 1866 *not* to require racial integration of schools, nor to prohibit racial discrimination in the admissions policies of schools, nor to in any way disturb the maintenance of separate, segregated schools for children in the United States.

The expressed reliance upon *Jones* as decisive on the question of whether Congress intended the Civil Rights Act of 1866 to require racial integration of schools is at odds with the fact that leading civil rights groups and advocates have known for many years that Congress had precisely the opposite intent. The writings of Alfred H. Kelly, constitutional historian and professor of history at Wayne State University, and Richard Kluger, author of *Simple Justice – The History of Brown v. Board of Education and Black America's Struggle for Equality*[1], make this quite clear.

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[1] Alfred A. Knopf, New York, 1976.

Professor Kelly, who is described by Kluger as key advisor to the NAACP's Legal Defense Fund during the *Brown* reargument,[2] in a paper entitled "An Inside View of Brown v. Board," which he read to the American Historical Association at its annual meeting on December 28, 1961,[3] stated that he found to his surprise that the debates printed in the 1866 volumes of the Globe had a good deal to say about school segregation, and that:

> ". . . The original civil rights bill, as reported out on the Senate floor by Lyman Trumbull early in 1866, had indeed been so broadly worded that it obviously would have struck down and outlawed entirely all State segregation laws – those sanctioning segregated schools as well as Jim Crow transportation facilities, and so on. Moreover, the desegregation features of the bill had indeed been attacked bitterly in the Senate as revolutionary and monstrous by several Senators, among them Garret Davis of Kentucky, Reverdy Johnson of Maryland, and the conservative Republican Cowan of Pennsylvania. Cowan, in particular, had denounced the bill on the ground that it would obviously do away with all segregated schools in the several States, only to have several Republican Radicals tell him that it was about time he woke up to the fact that there was a social and constitutional revolution going on in the country

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[2] Kluger, op. cit., at 799.

[3] Hearings before a Subcommittee of the Committee on the Judiciary of the U.S. Senate, 87th Cong., 2nd Sess., on the nomination of Thurgood Marshall to be United States Circuit Judge for the Second Circuit, May 1, July 12, August 8, 17, 20 and 24, 1962, p. 170. (This is the only publication petitioner's counsel could find in which Professor Kelly's paper is printed in full.)

and that he had better accommodate himself to it. Nonetheless, the bill passed the Senate with its sweeping language intact, Trumbull having defended it as merely an implementation of the 13th amendment and what he insisted on calling the 'bill of rights' incorporated in the 'privileges and immunities clause' in article IV of the old Constitution. So far, very good from the NAACP point of view.

"But when the civil rights bill reached the House, John A. Bingham, himself a Radical of Radicals and a member of the Committee of Fifteen, bitterly attacked the measure, on the grounds that Congress utterly lacked the power to legislate against legalized segregation in the States, either under the 13th amendment or the old 'privileges and immunities' clause in article IV. To do so, he said, was grossly unconstitutional. And although Wilson of Iowa somewhat weakly protested that the bill as then written could not be construed as banning legally segregated schools, Bingham's attack sent the bill back to the House Judiciary Committee, where the disputed ambiguous language was stricken out. Thereafter, it was reported to the floor once more, this time in a form which absolutely eliminated the controversial segregation language. The conclusion for any reasonably objective historian was painfully clear: The Civil Rights Act as it passed Congress was specifically rewritten to avoid the embarrassing question of a congressional attack upon State racial segregation laws, including school segregation . . ."

For statements to the same effect by Kluger, see Chapter 24, "The Six-Month Summer", pp. 617-656 of *Simple Justice.*

There is another impelling reason why the interpretation placed upon the legislative history of the Act in *Jones* cannot be considered controlling here. Not one of the numerous briefs filed in *Jones* fully or adequately informed the Court on the legislative history of the Act. Not a single brief informed the Court of the amendment striking the "no discrimination in civil rights" clause. Not a single brief informed the Court of the debate that resulted in that amendment. And because the opinion for the Court fails to mention the amendment or the debate that led to it, it seems clear that the Court was unaware of it.

The joint brief filed in *Jones* by the National Committee against Discrimination in Housing, the N.A.A.C.P., the Anti-defamation League of B'nai B'rith, and the American Jewish Congress, as *amici curiae*, cited tenBroek's *Equal under Law*[4] three times, and the Court cited it four times. Yet, although tenBroek in his chapter entitled "The Third Congressional Debate" (the debate on the Civil Rights Act of 1866), at page 180 refers to the "prohibition against any discrimination in civil rights" contained in the bill, counsel for petitioner has been unable to find any disclosure in tenBroek of the fact that the bill was amended before enactment to eliminate that prohibition.

Moreover, the brief of the *amici curiae* just mentioned contained at least four quotations from remarks made during the debate on the bill aimed at showing how "broad and sweeping" the speaker understood or intended the bill to be,

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[4] Collier Books, 1965.

and the opinion for the Court in *Jones* contains a considerable number of [redacted] quotations or references to remarks of that character, including four of the quotations contained in the *amici* brief, although all of such remarks were made *before* the deletion of the "no discrimination in civil rights" clause – at a time, therefore, when the bill indeed appeared to be "broad and sweeping." The quotations or references contained in the opinion for the Court are listed below:

(a) quotation from Congressman Wilson (Cong. Globe, 39th Cong., 1st Sess., at 1118), appearing at 392 U.S. 443-444;

(b) quotation from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 322), appearing at 392 U.S. 440;

(c) reference to remarks of Senator Howard (Cong. Globe, 39th Cong,, 1st Sess., at 504), appearing at 392 U.S. 433, n. 55;

(d) quotations from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 77, 474, 599), appearing at 392 U.S. 431-432;

(e) quotation from Senator Lane (Cong. Globe, 39th Cong., 1st Sess., at 603), appearing at 392 U.S. 433;

(f) reference to remarks of Senator Cowan (Cong. Globe, 39th Cong., 1st Sess., at 500), appearing at 392 U.S. 433, n. 56;

(g) reference to remarks of Senator Hendricks (Cong. Globe, 39th Cong., 1st Sess., at 601), appearing at 392 U.S. 433, n. 56;

(h) reference to remarks of Congressman Bingham (Cong. Globe, 39th Cong., 1st Sess., at 1292), appearing at 392 U.S. 424, n. 31;

(i) quotation from Senator Trumbull (Cong. Globe, 39th Cong., 1st Sess., at 323), appearing at 392 U.S. 424, n. 31.

In addition, counsel has been unable to find in any of the briefs filed in *Jones,* or in the majority or dissenting opinions, any reference to the fact that the language "as is enjoyed by white citizens" was not contained in the bill as introduced, but was added by amendment in committee; or any reference to the colloquy between Congressman Wilson and Congressman Delano (quoted pp. 42-44, Pet. Br.), in which Wilson explained that the limited purpose and intent of the amendment was to preclude a construction of the statute that would remove the existing legal disabilities of minors and females; or any reference to the highly significant colloquy between Senators Van Winkle and Trumbull, which is set forth below:

> "The President pro tempore: The Senator from Kentucky asks that the question be taken on the amendments separately. The first amendment is . . .
>
> The next amendment was in section one, line seventeen, after the word 'property', to insert the words 'as is enjoyed by white citizens.'
>
> MR. VAN WINKLE: There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude,

shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.

MR. TRUMBULL: I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.

MR. VAN WINKLE: It is a mere verbal correction that I suggested, and I am not at all strenuous about it; nor perhaps should I have made it had I been aware that the attention of the committee had been called to it.

The amendment was concurred in." (Cong. Globe, 39th Cong., 1st Sess., 1413)

II. THE FACT THAT PETITIONER IS A FOR-PROFIT CORPORATION DOES NOT DEPRIVE IT OF ITS FIRST AMENDMENT AND OTHER CONSTITUTIONAL RIGHTS, NOR DOES ITS ADVERTISEMENT IN THE YELLOW PAGES OF THE TELEPHONE DIRECTORY AFFECT ITS STATUS AS A PRIVATE ESTABLISHMENT OR MAKE IT A PUBLIC ACCOMMODATION.

In a landmark case decided by this Court in 1925, *Pierce v. Society of Sisters,* 268 U.S. 510, which is discussed at page 60 of Petitioner's principal brief, the defendant in the companion case, *Pierce v. Hill Military Academy,* was a for-profit corporation. As stated by the Court, at page 532:

> "Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of five and twenty-one years. The average attendance is one hundred, and the annual fees received for each student amount to some $800. . . . It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable . . ."

For other decisions holding that those who engage in commercial pursuits are not in consequence stripped of their First Amendment rights, see: *Ginzburg v. United States,* 383 U.S. 463, 474 (1966); *New York Times v. Sullivan,* 376 U.S. 254, 265-266 (1964); *Smith v. California,* 361 U.S. 147, 150 (1959); *Time v. Hill,* 385 U.S. 374, 396 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Ass'n,,* 389 U.S. 217, 223 (1967); and *Bigelow v. Virginia,* 421 U.S. 809 (1975).

The contention that the mere placing of a card or advertisement in the yellow pages of the telephone directory strips a private school of its status as a private establishment, with the right to maintain a racially discriminatory admissions policy if it wants to, is wholly without merit. Many parents would know neither the names nor the locations of private schools if it were not for the yellow pages. To carry such an advertisement is an aid to them. If they are interested enough to request further information, as authorized in the School's advertisement in the yellow pages (A. 74), they will quickly learn of the high standards for admission and continuance as a student in the School, and that the School reserves the right to exclude any applicant for any reason it may choose (A. 66). It was established by uncontradicted testimony that the School does not advertise in newspapers, magazines, radio or television (A. 239) and that most of the parents who send their children to the School learn about it from other parents (A. 238). It is clear from the uncontradicted evidence submitted on behalf of the School, which is detailed and discussed in full in Petitioner's principal brief, that the School is *not* open to all white children whose parents can pay the price of admission.

The correspondence between Jefferson and Madison on the subject of adoption of a Bill of Rights is significant in this connection. In the beginning it was Jefferson who most clearly saw the need for a Bill of Rights, but in the end Madison was as fully convinced of its necessity. See *Mason*, The States Rights Debate, Prentice-Hall, Inc., 1964, and especially pp. 167-185. Madison's letter of October 17, 1788, to Jefferson (*Mason*, op. cit., at 173) is especially instructive. At page 174 Madison said:

> ". . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents . . ."

The same letter appears in Boyd, *The Papers of Thomas Jefferson*, Princeton University Press, 1958, at page 19.

The seemingly uncontrollable impulse of some idealistic individuals, and of church groups and other organizations dedicated to social reform, to impose their own concepts of what is morally and religiously right[5] upon the rest of us, is especially noticeable in the area of race relations. While such individuals and organizations are probably not in the majority, they have a dominant voice and influence on the public scene. The Bill of Rights was intended to

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[5] "The heart of the race question is moral and religious . . ." *Catholic Bishops Speak on Racial Discrimination and the Moral Law*, Statement of Principles and Objectives, Catholic Interracial Council of Chicago, National Catholic Welfare Conference, for the Bishops of the United States, November 14, 1958 (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess. (Civil Rights - 1959), Part 4, Appendix-continued, p. 2744).

protect our private rights even from invasion by the well-intentioned.

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